No. 10494

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

PATHFINDER PETROLEUM COMPANY, a Corporation,

Appellee,

and

PATHFINDER PETROLEUM COMPANY, a Corporation,

Appellant,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellee,

CLOSING BRIEF OF APPELLANT AND CROSS-APPELLEE, GENERAL INSURANCE COMPANY OF AMERICA, A CORPORATION.

W. O. SCHELL,
GERALD F. H. DELAMER,
215 West Seventh Street, Los Angeles,

Attorneys for Appellant and Cross-Appellee, General Insurance Company of America, a corporation.

Parker & Baird Company, Law Printers, Los Angeles

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

Statutes.

Textbooks.

No. 10494

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

PATHFINDER PETROLEUM COMPANY, a Corporation,

Appellee,

and

PATHFINDER PETROLEUM COMPANY, a Corporation,

Appellant,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellee,

CLOSING BRIEF OF APPELLANT AND CROSS-APPELLEE, GENERAL INSURANCE COMPANY OF AMERICA, A CORPORATION.

I.

Statement of Facts.

Under the heading "Statement of the Case," appellee and cross-appellant (hereinafter for clarity called plaintiff), states, page 2, "The appeal and cross-appeal involve the interpretation of a use and occupancy policy. . . ."

No question whatever of the interpretation of the policy arises in connection with the appeal taken by the defendant. The interpretation of the policy was stipulated to, namely, that the plaintiff could only recover if it would have made a profit had there been no fire.

Nowhere in plaintiff's brief does it dispute in the slightest any statement of fact or figures set forth in our opening brief. Plaintiff could hardly do so since they are all established by its own witnesses and books. Nowhere does plaintiff dispute that if any basis is to be taken except the over-all experience taken as a whole, of the entire eight months preceding the fire, the evidence shows that the plaintiff would have operated at a substantial loss for the suspension period.

II.

Reply to Plaintiff's Answer to Our Opening Brief.

1.

Preliminary.

Plaintiff quotes, page 18, a portion of the policy which provides that

> "*due* consideration shall be given to the experience of the business before the fire *and the probable experience thereafter,*" (italics ours).

We contend that if a marked change in market conditions occurred during the experience before the fire, *due* consideration requires a consideration of this fact. We contend that experience, that is actual receipts and costs after the fire, should also be taken into consideration.

On page 20 plaintiff says that the cross-examination of defendant's accountant shows weakness in his testimony. This we deny. However that may be, our opening brief is based *solely* on the evidence of plaintiff's books and its own witnesses.

On page 21 plaintiff says we contend that the policy was subject to nine separate *interpretations*. Of course, this is not so. The policy was susceptible of one and only one construction, and that construction was stipulated to. We suggested that there were nine methods of ascertaining the *fact* as to whether the plaintiff would have made a profit or sustained a loss during the suspension period. This has nothing to do with policy interpretation. We might also point out that while we suggested these nine methods of ascertaining the fact, we also stated that we believed only one of these was the correct method (Op. Br. p. 35), namely, the ascertaining of the actual extra cost to the plaintiff of purchasing rather than manufacturing gasoline and a comparison of this extra cost with the admitted loss sustained by the plaintiff. If the extra cost exceeded the actual loss, then plaintiff would have made a profit had it not sustained this extra cost. If the extra cost was not as great as the actual loss, as was the fact, then even had that extra cost not been incurred, plaintiff would still have operated at a loss.

2.

Plaintiff's Sub-heading "A", Pages 23-25.

Plaintiff says that the proof of loss did take into consideration a depreciation of $3,034.93. It is true that it does do so in one place [Tr. p. 66], but this depreciation is not carried forward into the summary of operations found on Tr. p. 68, nor does plaintiff's auditor refer to it in his testimony. [Tr. pp. 205-208, 238.]

Plaintiff says that depreciation as used in its income tax returns is not conclusive against it. We may concede this, but plaintiff omits to mention that both plaintiff's president, Mr. De Vere, and its auditor testified that the depreciation as set forth in these income tax returns was substantially the same amount as would have been arrived

at in the ordinary way of figuring depreciation, that is a comparison of the cost of the equipment as compared with its estimated useful life. [Tr. pp. 218-219, 299-303.] Depreciation in the total sum of $23,079.59 is established not merely by the income tax returns but also by this testimony of both the plaintiff's own witnesses.

Mr. De Vere did say on direct examination at one place that "we felt" that the item of $3034.99 reflected the true depreciation. [Tr. pp. 208-209.] This is not testimony that it *was* the true depreciation. In this connection we again call the Court's attention to the many inaccuracies in Mr. De Vere's much more positive statements than mere expression of "feeling". (See Op. Br. pp. 10-13.) However, even if Mr. De Vere's testimony as to his "feeling" otherwise had any weight, it would be entirely eliminated by his later testimony on cross-examination above referred to, as to the basis of arriving at the depreciation set forth in the tax returns.

The cardinal fact remains that even plaintiff does not dispute that if depreciation arrived at, not by a mere "feeling," but by the ordinary and logical method of calculating it is to be considered, then under any theory the amount awarded by the trial court is excessive.

3.

Plaintiff's Sub-heading "B", Pages 25-26.

This is taking the preceding three months as the basis.

Plaintiff says, pages 25-26, that if these three months were to be taken into consideration the policy should so read. This might be true were we contending that the three months period was an arbitrary one to be used in all cases. This is not our contention, which simply is that an event happened to occur, namely, the gasoline war and consequent break in prices, at the end of the first five months, which event rendered the experience before that

time entirely useless as a basis for computing what would happen thereafter and while the break in prices continued. It is this event and not a policy provision which makes the difference between the first five months and the three months of the suspension period.

Had the fire occurred early in the year or had market conditions continued as they existed when the policy was written, the fire would have caused plaintiff a loss of profits and it would have received payment under the policy. It was this break in the market and the continued drop in prices thereafter *and not the fire* which rendered it impossible for plaintiff to operate at a profit.

Plaintiff at a time when market conditions were favorable bought and paid for insurance merely upon its profits. It did not buy from or pay defendant for insurance against loss generally. Had plaintiff desired the coverage for actual loss when conditions changed so as to reduce or eliminate its prospects for making profits, it should have applied therefore and paid the much higher premium charged for a policy covering this enlarged risk.

Plaintiff says, p. 26, that we do not mention that the drop in profits during the last three months before the fire was explained by plaintiff to be due to irregularity in manufacture and in installation of improvements. Actually the testimony referred to in support of this statement is only with regard to the months of June and not to the entire three months [Tr. p. 338], and profits in August were much lower than those of June. However, a comparison of sales prices and profits, as shown on the charts, Defendant's Exhibits B, C and D, clearly and conclusively show that the controlling factor determining profits was the price obtained and that profits varied directly as did such prices, a fact which anyway is so obvious and well known as not to require the substantiation of the actual figures shown on the charts.

Plaintiff says, page 26, that the argument that the price per gallon obtained by plaintiff indicates a smaller profit, is not valid because it does not take into consideration the cost of manufacturing. Of course we *did* take into consideration the cost of manufacturing, which plaintiff's own evidence shows to have remained practically constant before and after the break in prices. Before the break, the average cost of manufacture per gallon was 4.605 cents and for the three months after the break it was 4.613 cents. [Appendix 2, Op. Br.] The difference of .008 of a cent would only amount to the sum of $80.00 upon one million gallons of gasoline manufactured.

Plaintiff now says that its own Exhibit 7 was not intended to give the estimated average cost of manufacturing during the suspension period. This is a new claim. Certainly it expressly sets it forth, and certainly it was so considered by the parties and the court, both at the trial and upon the motion for new trial. It is plaintiff's own express estimate on the point, and is the only evidence thereon. Plaintiff may not now like it, but that does not destroy its effect as evidence.

4.

Plaintiff's Sub-heading "C", Pages 27-28.

If plaintiff's *Actual* experience shows that the profit for the months immediately preceding and following the fire was only 1/30th of its profit for May and 1/20th of its profit for March and April, as plaintiff says is the case (pp. 27-28), this would seem to be conclusive that the experience of March, April and May furnishes no criterium of what would have happened between these months immediately preceding and following the suspension period.

5.

Plaintiff's Sub-heading "D, E, F," Page 28.

Plaintiff's only criticism of these methods is that it says they do not take into consideration, (1) the top heavy cost of sales operation during the suspension period, and (2) the fluctuations in the cost of raw materials and manufacture.

With regard to the first we might point out that there is no evidence that the cost of sales organization varied in any way after the fire from what it had been before the fire, or that the fire caused any such variation if there was one. With regard to the second point, we did specifically take into consideration in these computations, as in all other computation, the total cost of manufacturing the gasoline, which necessarily includes the cost of raw materials, and we took the figures given by plaintiff's own witnesses.

6.

Plaintiff's Sub-heading "G, H, I," Pages 28-31.

This is the method which we believe to have been the correct one. It is a comparison of the extra cost of the purchase of gasoline over the cost of manufacturing thereof, as *estimated by plaintiff itself in Exhibit 7* (App. 5 to Op. Br.), and upon which exhibit plaintiff itself bases its claim that it cost it more to purchase gasoline than to have manufactured gasoline.

Admittedly plaintiff suffered an actual loss during the suspension period of $32,975.68. (Deft. Br. p. 29.) It would have saved $30,995.94 had it manufactured *all* the gasoline it purchased during the suspension period. (Pl. Ex. 7.) Even if it had manufactured *all* of this gasoline, which admittedly it would not have done, it still would

have operated at a loss of $1,979.74 for the suspension period, and therefore would have made no profit.

Plaintiff here again tries to avoid the effect of its Exhibit 7. Plaintiff introduced this exhibit to support one of its own contentions and cannot now avoid the effect thereof by referring to matters which it says *might* have changed the result shown on that exhibit. As there is no evidence of these "might have beens", there is nothing to contradict the exhibit on the point.

Plaintiff contends, page 29, that these figures show that plaintiff would have been "smarter" not to have continued in business during the suspension period, and it says, page 30, that plaintiff's loss would have been immeasurably greater had it not continued in business. These statements seem contradictory. We need not consider them. The question is not whether plaintiff would have done better to have closed down, or whether plaintiff saved money by not doing so. The sole question is whether, had there been no fire, plaintiff would have made a net profit. Plaintiff's own figures conclusively establish that it would not have done so.

Plaintiff says, page 31, that Mr. DeCamp told it to proceed to purchase gasoline and attempt thereby to minimize its loss. A reference to the transcript, pages 209-211, shows that Mr. DeCamp said nothing whatever about purchasing gasoline. Of course, at that time Mr. DeCamp did not know whether the fire would occasion a loss of profits, and merely told the plaintiff to do what it could to minimize the loss covered by the policy, an obligation it was under anyhow under the provisions of the policy.

Finally, plaintiff says that if an insured honestly tries to minimize its loss, that insured should be allowed a recovery even though it would not have made a profit had there been no fire. The policy, of course, contains no such provision, and it would not be reasonable if it did. If

there would have been no profits had there been no fire, then there necessarily would be no loss insured against by the policy which could be minimized. To allow a recovery because an insured tried to minimize a loss not covered by the policy, would in effect be to make the policy cover that loss. In this case it would be to rewrite the policy into one against loss generally instead of one merely against loss of profits.

III.

Reply to Brief in Support of Plaintiff's Cross-Appeal.

1.

Proof of Loss and Notice of Disagreement.

The cardinal fallacy in plaintiff's argument on this point is in a failure to distinguish between a mere ***general denial of liability*** and a disagreement with the amount of loss claimed.

If an insurer upon receipt of a proof of loss merely denies liability upon the policy, it may be that it should be deemed to have admitted the amount of loss, if there was liability. Likewise, if an insurer merely disagrees with the amount of loss, it might be deemed to have admitted liability for such loss as was sustained.

Thus if the defendant herein had merely denied liability on the ground for instance that the fire was deliberately caused by the insured or was not on insured premises, then on proof that the fire was not caused by the insured or was on insured premises, then it might not be in a position to deny the claimed amount of the loss. In the present case, however, the defendant never has denied liability, that is that its policy covered the fire. It does, however, claim that because of peculiar circumstances that fire occasioned no loss covered by the policy. Its notice of disagreement was not a denial of liability but a notice

that it disagreed in whole with the amount of loss claimed and admitted no loss in connection therewith. It waived any claim the fire was not covered by the policy. It definitely asserted its claim that the fire occasioned no loss covered thereby.

However, let us consider the policy provisions and notice of disagreement in detail. The Court will remember that while the policy involved in this case has been referred to as a use and occupancy policy (hereinafter referred to as U & O), in fact it is a California standard form fire insurance policy to which a U & O endorsement has been attached.

The provisions of the clauses headed, "Duty of Insured in Case of Loss" [Tr. pp. 32-34] and the provision for a notice of disagreement [Tr. p. 34] are applicable only to the case of a loss of physical property by reason of a fire, and are not applicable to a loss of profits or fixed charges and expenses.

Thus the policy provides under the heading, "Duty of Insured in Case of Loss," that the insured will furnish a proof of loss setting forth eight separate items. Only the first item has any application to a loss of profits or fixed charges and expenses by reason of a fire. The remaining items are applicable only where the loss consists of the loss of or damage to physical properties. They have no application where the loss claimed is that of the anticipated future profits and continuing fixed charges and expenses.

In this connection we call the Court's attention to the fact that subdivision (c) on the first page of the proof of loss furnished by plaintiff [Tr. p. 61] reads as follows: "The cash value of the different articles or properties and the amount of loss thereon is stated in detail in the inventory furnished, and the schedule attached hereto and

made a part hereof," and on the second page [Tr. p. 63] appears a series of columns, the first of which is headed, "Property, Items of Policy," under which appear "1st Item," "2nd Item," etc. After each of these items certain information is requested. No attempt has been made by plaintiff to segregate these items and, in fact, there is typed in over the words "First Item," the words "Total Policy," which is followed by the total claim of the plaintiff.

It is, therefore, in our opinion, very doubtful indeed whether any proof of loss is required where the loss is sustained under the U & O endorsement.

Turning now to the provision headed, "Ascertainment of Amount of Loss" [Tr. p. 34], we find that this requires the company to notify the insured in writing of its partial or total disagreement with the amount of loss claimed by the insured. This the defendant did do, the notification reading [Tr. p. 114]:

> "You are hereby notified the undersigned totally disagrees with the amount of loss claimed by you in said Preliminary Proof of Loss. . . ."

It is to be noted that in plaintiff's brief no reference is made to this part of the notice.

The policy provision further provides that said notice shall also notify the assured "of the amount of loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendment thereto." Inasmuch as no "articles or properties" are involved in this claimed U & O loss, and inasmuch as the proof of loss set forth no "articles or properties" and contained no claim of the amount of loss on any "article or property" there not only was no requirement, but it would have been utterly impossible for the defendant to

have notified the plaintiff of the amount of loss, if any, it admitted on each of the different articles or properties set forth in the proof of loss.

This provision of the policy is applicable only where the loss claimed is a loss of specific property destroyed or damaged by reason of the fire.

However, even if the provisions of the policy can be construed as requiring the proof of loss to set forth the amount of loss if any claimed upon different "articles of properties" set forth therein, and even if the proof of loss could be considered as setting forth the amount of loss claimed upon these different "articles and properties" the notice of disagreement given by the defendant fully complies with the requirement of the policy, further reading as it does [Tr. p. 114]:

> "You are hereby notified . . . the amount of loss which this company admits on each or all of the items described in said preliminary proof of loss is nothing.
>
> "You are further notified that the undersigned does not admit that you suffered any loss on each or any of the different articles, or on each or any of the different properties set forth in said preliminary proof of loss."

We fail to see how this notification could have more clearly notified the assured that the amount of loss which the defendant admitted on each of the different articles or properties was nothing and that it would not admit any loss on any of said different articles or properties.

We most earnestly submit, however, that where a policy provides that the company shall notify the insured in writ-

ing of the "amount of loss, if any, the company admits on each of the different articles of properties . . ." this requirement is fully complied with by a statement in writing that: "The amount of loss which the company admits on each or all of the items . . . is nothing," and that the company "does not admit that you suffered any loss on each or any of the different articles or on each or any of the different properties . . ." It seems to us that this is not only a literal compliance with the requirement of the policy, but is just as effective and gives to the plaintiff exactly the same information as if that letter had listed each "article or property" (assuming for the sake of argument that different "articles or properties" were specified in the proof of loss) and that after each of these items had been written the word nothing. Certainly this latter and laborious method would have been of no advantage to the plaintiff herein and would not have conveyed any greater information to it than was conveyed by the form of letter actually used. The substance of the communication in either event would have been exactly the same.

In this connection we would call the court's attention to certain of the maximums of jurisprudence as set forth in the California Civil Code as follows: *C. C.* 3528: "The law respects form less than substance." *C. C.* 3532: "The law neither does nor requires idle acts." *C. C.* 3542: "Interpretation must be reasonable."

We, therefore, submit that even if the provisions requiring such notice of disagreement can be said to be applicable at all to a claimed U & O loss, the defendant has fully and completely complied with both the letter and the spirit of said policy provisions in this respect and that the plaintiff was fully and clearly notified of the attitude of the company, namely, that it admitted no loss whatsoever coming under the terms of the U & O endorsement.

Plaintiff cites, p. 8, *Victoria Park Co. v. Continental Ins. Co.,* 39 Cal. App. 347, 178 Pac. 724. This case involved the destruction of property by fire. The proof of loss was not excepted to by the insurer except that ten days after its receipt a letter was written plaintiff stating:

> "According to your documents we are criticising Section 'C' and we are also criticising the elimination of the date of the fire."

The Court held that the statement, "According to your documents we are criticising section 'C' and we are also criticising the elimination of the date of the fire," did not *express* any disagreement with the *amount* stated by the company, either as to the whole or any part thereof. We cannot see how this case has any analogy to the present case, as abviously a statement "we are criticising section 'C' " is in nowise the equivalent of a statement of the amount of loss admitted on this item, or that no amount was admitted thereon.

In fact, the opinion of the court strongly implies that, no matter how inaptly worded, a notice informing the insured of the amount of loss admitted or that no loss whatsoever was admitted, would have been sufficient.

Plaintiff cites, p. 7, *Lauman v. The Concordia Fire Ins. Co.,* 50 Cal. App. 609, 195 Pac. 951. This case again involved the destruction of specific property by a fire.

The letter of disagreement merely stated that the company disagreed with the proof of loss because it failed to show any interest of the insured in the property damaged. This is entirely consistent with the company admitting that the *amount* of loss caused by the fire was exactly as claimed in the proofs.

This is particularly emphasized by the express statement of the court itself on page 620 as follows:

> "No objection is made in the letter to the amount of any loss, but it is based solely on the reason stated."

The court then points out that proof was made that the plaintiff had assumed liability for the goods destroyed and that no contention was made that the evidence was not sufficient to support the court's finding to that effect. The plaintiff therefore fully met the only objection raised by defendant's letter of disagreement and therefore was obviously entitled to recovery.

The present case is exactly the reverse of the *Lauman* case. In the *Lauman* case there was a denial of any *liability* but no disagreement with the amount of loss claimed. In the present case there is no denial of liability, but there is a total disagreement with the amount of loss claimed and a statement that the amount of loss admitted on each item was nothing.

We submit that the *Lauman* case is not authority for the contentions of plaintiff, but is strong inferential authority for the position of the defendant, since the opening part of the letter of disagreement in the *Lauman* case is much less specific than is the letter involved in the present case, and yet in the *Lauman* case the letter itself was *not* held to be insufficient, but was merely held to limit the right of the defendant to rely upon the specific objections therein set forth.

The court held that *having limited its disagreement* with the claimed loss to certain specific reasons, the defendant had to stand or fall upon these reasons.

It is true that in this case the court in *dictum*, says:

> "The general denial of all liability would not meet the requirements of its (insurer's) obligation under the policy to designate the different articles for which it disclaimed liability. (*Victoria Park Co. v. Continental Ins. Co.*, 50 Cal. App. 609, 195 Pac. 951.)"

The *Victoria Park Company* case, which we have just discussed, certainly does not support this statement since

in it, as we have seen, there was no denial of liability but merely a statement that a certain item was "criticised." The *Lauman* case itself, is merely to the effect that when a general denial of liability is specifically placed upon certain specific grounds, then liability on the policy cannot be avoided on other and different grounds. Even in the quoted *dictum* the court does not say that a general disagreement with the *amount* of loss claimed in a proof of loss or a general statement that the insurer does not admit any loss on any of the items is insufficient. The intimation in both cases is that such a general statement, if made without limiting qualification, is in fact sufficient.

We submit, however, that the notice of disagreement given by the defendant in the present case is not a mere notice of general disagreement, but is as specific as it can be made by the English language. We will repeat the wording of the notice of disagreement adding italics:

> "You are hereby notified the amount of loss which the company admits *on each or all* of the items specified in said preliminary proof of loss is *nothing.* * * * You are further notified that the undersigned *does not admit* that you suffered *any loss on each or any* of the different articles or on *each or any* of the different properties set forth in said preliminary proof of loss." (Italics added.)

2.

Failure to Have Appraisal.

It is true that the policy provides that if the parties fail to agree upon the amount of loss, the company shall demand in writing an appraisement.

However, the policy does not set forth any penalty to be incurred by the company for failure so to do, except that such appraisement thereupon ceases to be a condition precedent to the bringing of suit by the insured. [Tr. p.

35.] There is no provision whatever in the policy that a failure to demand the appraisement will establish the loss as the amount claimed in the proof of loss, or will deprive the company of any defense it would otherwise have, except that of plaintiff's suit being premature.

Plaintiff has cited no authority in support of its contention. The two cases plaintiff cites, pp. 16 and 17, merely hold that unless such appraisement is had the insured may not institute suit. We admit that this is no longer true where the policy provides that the company shall take the first step towards such appraisement, but fails to do so. In other words, we have never contended that this suit instituted by the plaintiff is premature.

Plaintiff stresses the use of the word "shall" in the policy provision, "If the insured and this company fail to agree in whole or in part as to the amount of loss within ten days after such notification, this company *shall* forthwith demand in writing an appraisement. . . ." However, in *Grotz v. Insurance Company of North America,* 282 Pa. 224, 127 A. 620, the policy provision was, "In case the insured and this company shall fail to agree as to the amount of loss or damage each *shall,* on the written demand of either, select a competent and disinterested appraiser." The assured did in writing demand an appraisal. The company refused to appoint an appraiser. Despite the use of the word "shall" in the policy which, incidentally, was a statutory form, the court held that the failure of the company to comply with this provision did not deprive it of its defense on the merits to plaintiff's action, or of its privilege of requiring the plaintiff to establish by proof the amount of loss which the plaintiff had sustained.

To the same effect is *Penn. Plate Glass Co. v. Spring Garden Insurance Co.,* 189 Pa. 255, 42 A. 138, 139, in which case, while the court does not specifically mention a

written demand by plaintiff, it does appear that the plaintiff did make a sufficient demand for an appraisement, and that the defendant refused to participate therein.

The question of the effect of a failure to have an appraisement is dealt with in a lengthy note in 94 *A. L. R.* 499, 515.

Plaintiff never requested an appraisement or otherwise called the matter to the attention of defendant. It certainly is not the law that a breach, possibly unintentional, of a contract in one respect deprives that party of all defenses thereon. A contract provides that the purchaser shall pay the purchase price in installments but contains no acceleration clause. The purchaser fails to pay an installment when due. This does not give the seller the right to sue immediately for the entire amount.

Assume that each party to a contract breaches some provisions thereof. Is each thereby deprived of all defenses to an action by the other?

We submit that common sense and the authorities establish that in the absence of contract provisions to the contrary, the only effect of a breach of a provision of a contract is: (1) possibly to permit the other party to rescind or (2) to allow that other party the damage he has sustained by the particular breach and that the burden is on him of establishing the amount of such damage.

IV.

The Amount Allowed by the Court on Account of Fixed Charges and Expenses.

Defendant complains on its appeal of the method which the court adopted in arriving at the amount of fixed charges and expenses which it allowed, namely, cutting half the amount claimed by the plaintiff. While there is authority which would support the action of the court in

taking a more or less arbitrary figure, provided that figure is not in excess of what the evidence shows to have been such fixed charges and expenses (*Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp.,* 64 Fed. (2d) 347, 352), we do not believe that this is a satisfactory method of arriving at the determination.

In this connection it will be remembered that in order to entitle to recovery under the policy for fixed charges and expenses, those fixed charges and expenses must not only have been incurred but they must have been the fixed charges and expenses listed under Item 2 of the policy [Tr. pp. 13-14], they must have necessarily continued during the suspension of business [Tr. p. 16], and they must also have been such charges and expenses as would have been earned had no fire occurred. [Tr. p. 16.]

It is our contention that such charges and expenses are not recoverable where the evidence shows that the insured would not have operated at a profit, but would have sustained a loss, *Goetz v. Hartford Fire Ins. Co.,* 193 Wis. 638, 215 N. W. 440, 441, and that consequently the plaintiff was entitled to no recovery under Item II.

Even if the plaintiff would have earned certain fixed charges and expenses a large number of those included in the award by the Court do not come within the items set forth in Item II of the policy. [Tr. pp. 13-14.]

There was no evidence that any of the employees whose salaries are included in the amounts claimed by plaintiff were indispensible employees; it positively appears from the evidence that the superintendents, executives and employees of the plaintiff were not under contract; a number of these salaries were actually repaid to the plaintiff by the insurance company carrying its regular fire insurance policy, salaries included in the award were in fact not paid in that amount; a proportion of all these charges and expenses, were properly chargeable against its business of

purchasing and selling gasoline rather than its business of manufacturing and selling gasoline; and practically every item of plaintiff's claim for fixed charges and expenses was exaggerated.

We submit that even if it were shown by the evidence that these fixed charges and expenses would have been earned by the plaintiff, which we believe the evidence negatives rather than shows, they would not have exceeded either $5,801.25 or $6,198.20 according to the basis used in arriving at the amount. [Tr. pp. 358-261.]

We submit that while the method adopted by the court is not one to meet with unqualified approval, nevertheless the plaintiff has not been injured thereby.

V.

Conclusion.

Wherefore, it is respectfully submitted that the judgment in favor of the plaintiff in so far as it awarded the plaintiff $22,974.94 for alleged loss of profits which it would have earned, should be reversed, but that since the defendant did not appeal therefrom there is no necessity for a reversal of the remainder of said judgment.

Respectfully submitted,

W. O. Schell,

Gerald F. H. Delamer,

Attorneys for Appellant, General Insurance Company of America, a Corporation.